

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

No. 10,557

BRIEF OF APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT *United States Court of Appeals*
For the
District of Columbia Circuit

FILED APR 25 1950

EDWARD GEORGE DAVID, *Appellant,*

VS.

DISTRICT OF COLUMBIA, *Appellee.*

CLERK

248

**Appeal from the United States District Court
for the District of Columbia**

RICHARD W. GALIHER

JULIAN H. REIS

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637 Woodward Building

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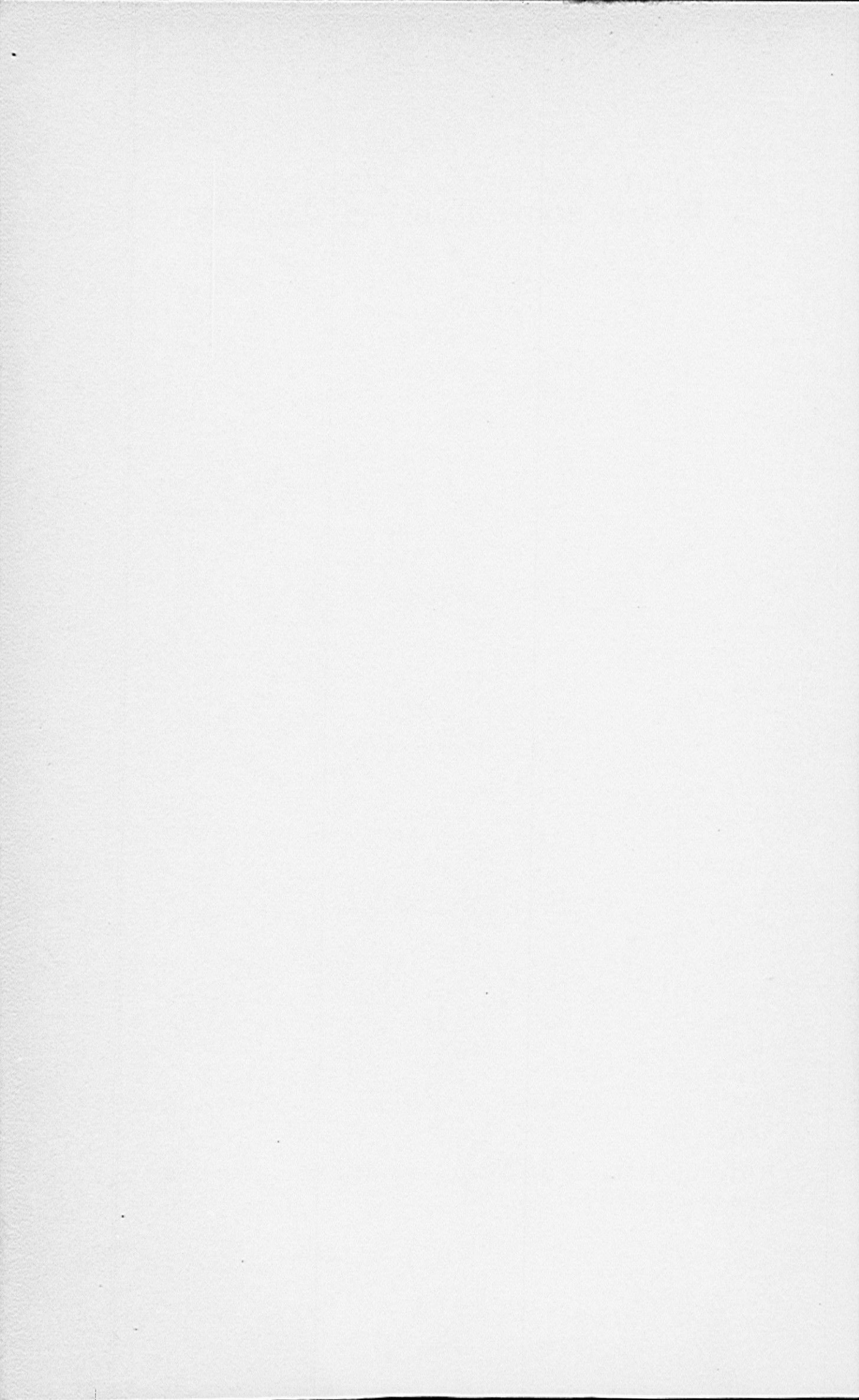
Attorneys for Appellant

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,557

EDWARD GEORGE DAVID, *Appellant*,

vs.

DISTRICT OF COLUMBIA, *Appellee*.

Appeal from the United States District Court
for the District of Columbia

BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal by Edward George David, defendant and third party plaintiff below from an order of the United States District Court for the District of Columbia dismissing a third party complaint brought against the appellee, the District of Columbia, a Municipal corporation, who was the third party defendant below (A. page 13A).

Notice of appeal was duly given and an undertaking on appeal was filed (A. page 13).

Jurisdiction below was based on Title 11, Section 301 et al of the D. C. Code 1940 edition as amended and Rule 14 of the Federal Rules of Civil Procedure which rule was invoked by the filing of the third party complaint.

Jurisdiction in this Court is conferred by Title 11, Section 101 of the D. C. Code 1940 edition as amended.

STATEMENT OF THE CASE

Charles W. Short filed a complaint in the Court below against Edward George David, the appellant herein, the defendant below, and others, seeking damages for personal injuries as the result of a fall on January 1, 1948 in front of 1123 17th Street, N. E. which premises are owned by Louis J. and George Courembis, the other defendants in the Court below, and in which property the appellant David, leased a portion of the space on the basement or ground floor where he operated a restaurant. It is alleged by Short, the plaintiff below, that the space in front of the appellant's show window is the property of the District of Columbia, the appellee herein, and that the injuries complained of occurred on the property belonging to the District of Columbia. (A. page 2).

Suit was filed June 29, 1949 and served upon the appellant herein who then made a motion to bring in a third party defendant (A. page 7), the District of Columbia, which motion was granted. (A. page 8). Whereupon David, the defendant below, filed his answer (A. page 10) and cross-claim and the third party complaint against the District of Columbia, the appellee herein. (A. page 8).

In answer to the third party complaint, the District of Columbia filed a motion to dismiss (A. page 12) on the grounds that the third party complaint failed to state a claim against the third party defendant upon which relief could be granted; namely that (1) no notice was given

the District of Columbia as provided by the D. C. Code, 1940 Edition as amended, title 12, section 208 (2). That there was no actionable negligence against the District of Columbia as the enforcement of regulations is a governmental function. The appellant, in opposition to said motion, stated that on September 30, 1949 proper notice was given the District of Columbia, the third party defendant below, the appellee, herein and that the third party defendant had allowed the third party plaintiff to amend his complaint by interlining to that effect, but without the conceding that the notice was a proper one. The appellant, the third party plaintiff below, then stated (1) that the notice was served upon the third party defendant, the District of Columbia, within 6 months after suit was served upon him and (2) that the appellee, the District of Columbia, had the duty to maintain the sidewalks and public spaces and also that it might be liable to him in whole or in part for any judgment recovered against him. After a hearing the Court granted the motion to dismiss and signed an order accordingly. (A. page 13).

POINTS ON APPEAL

The Court erred in granting the motion of the District of Columbia, the third party defendant below, to dismiss the complaint.

ARGUMENT

It is admitted that the plaintiff below could not sue the District of Columbia because of non-compliance with the provisions of Title 12, Section 208 of the D. C. Code 1940 Edition as amended.

“No action shall be maintained against the District of Columbia for unliquidated damages to person or property unless the claimant within six months after the injury or damage was sustained, he, his agent, or

attorney gave notice in writing to the commissioners of the District of Columbia of the approximate time, place, cause and circumstances of such injury or damage: Provided, however, That a report in writing by the Metropolitan police department, in regular course of duty, shall be regarded as a sufficient notice under the above provision. (Feb. 28, 1933, 47 Stat. 1370, ch. 138.)”

There is likewise no difference of opinion but that the plaintiff had a cause of action against the District of Columbia and that had the District of Columbia been a party that the defendant below, David, could have filed a cross-claim against the District of Columbia.

The first question to be resolved by this Court is whether the appellant herein had to give notice pursuant to Title 12, Section 208, D. C. Code, Supra. within 6 months after the injury occurred to a stranger in front of his restaurant and prior to being sued himself or if it was sufficient for David to give notice to the District of Columbia within 6 months after being sued or even 6 months after an adverse judgment, if any, is rendered against him.

The second question to be resolved by this Court is whether the complaint of David, the defendant and third party plaintiff below, states a claim upon which relief may be granted.

1. The notice given the District of Columbia, the third party defendant below, the appellee herein, was sufficient and within the meaning of the provisions of the Act of February 28, 1933, 47 Stat. 1370, Title 12, Section 208 D. C. Code 1940 Edition as amended. It is true this statute must be strictly construed being in derogation of common law rights. *D. C. vs. World Fire and Marine Insurance Company*, ... M. Ct. of Appeals, 68 A (2d) 222. Let us construe this statute strictly word by word,

“No action shall be maintained against the District of Columbia * * * unless the claimant within 6 months

after the injury *or damage was sustained* * * * gave notice in writing * * *."

The italics were added by counsel as these are the words relied upon by the appellant. The appellant's contention is that he was not injured but that he has been sued and may therefore, be damaged and he therefore has until 6 months after judgment is entered, if judgment is against him, within which to give notice to the District of Columbia to comply with the statute. Actual damage to David started the day that he received the suit papers as he on that day had to retain counsel to prepare his defense. Substantial damages however might not be incurred by David until a judgment is rendered against him. It is easily recognized that the use of the word *or* between the words injury and damage is a conjunctive that marks an alternative such as either, else, otherwise and also.

In the face of the now established law of this jurisdiction which has been expounded in the case of *Knell v. Feltman*, ... App. D. C., 174 F (2d) 662, namely that there is contribution against joint tort feasons, David's complaint against the District of Columbia should not have been dismissed. More specifically, should judgment be rendered against David he could then sue the District of Columbia for contribution based on the theory that the accident occurred on the property of the District of Columbia and that they had the duty to maintain such property and that he has paid a judgment and that the District of Columbia should in effect have paid the judgment, or some part of it, and that he has unjustly paid more than his share of the judgment.

Can it be said that the District of Columbia can not be interpleaded pursuant to Rule 14 of the Federal Rules of Civil Procedure to contribute in whole or in part to any judgment rendered against David. Rule 14 itself lends weight to the belief of the appellant that the District of

Columbia can be brought into this action for the purposes of contribution, if for no other purpose.

“A party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff’s claim against him”

This portion of Rule 14 speaks for itself and is in line with the trend of the law in this jurisdiction and certainly points to the economic and practical manner of handling a case of this nature. Why should there be 2 trials when there can in fact be one trial and the cost can be reduced and the spirit of Rule 42A carried out which rule encourages the trying of all cases involving a common question of law or fact rather than have 2 separate trials, one by the plaintiff and defendant in the original action below and if the plaintiff is successful then the appellant herein would have to sue the District of Columbia, the appellee herein for contribution at the expense of additional time and costs of all parties concerned. Under the claim of the plaintiff the appellant may be held responsible to him even though the accident happened on the property of the District of Columbia and away from the demised premises. In all fairness appellant should be able to look to the District of Columbia for contribution or indemnification.

2. This brings us to the second point: Does David’s complaint state a cause of action against the District of Columbia? There are several directions of thought that can be used to approach this problem and both lead to the same affirmative answer. It is readily seen that the complaint filed by the plaintiff below states a cause of action against the District of Columbia but the District of Columbia was not made a party defendant. The appellant David, the defendant below, incorporated the plaintiff’s complaint in his own third party complaint by reference and by attaching a copy to his complaint against the District of Columbia, the appellee. This of itself calls upon the third party defendant, the District of Columbia, to

answer the extrinsicities of the original suit. Secondly, David, the third party plaintiff below, sought relief in the form of contribution,—in whole or in part to recover from the third party defendant, the District of Columbia, for all sums that the plaintiff below may recover against the defendant David. Clearly contribution was sought from the District of Columbia. This jurisdiction recognizes contribution and that it may be a separate and distinct cause of action and that it may also be maintained as such either as a third party action or in a separate suit. *George's Radio Inc. v. Capital Transit Company*, 75 U. S. App. D. C. 187, 189, 126 F. 2nd 219, 221 (1942); *Knell v. Feltman*, ... U. S. App. D. C., 174 F. 2nd 662; *Yellow Cab Company v. Janson*, ... U. S. App. D. C. Opinion No. 10318, Decided December 15, 1949; *Yellow Cab Company v. Dreisler*, ... U. S. App. D. C. Opinion No. 10329, Decided April 10, 1950. Questions of fact are presented in the original complaint that the jury should hear and determine and the same jury should at the same time hear and determine the allegations that the defendant makes against the District of Columbia and they should at the same time render a decision on this complaint.

The District of Columbia has taken a somewhat reclusive attitude that they are being sued for failure to properly enforce a Municipal regulation and that in this respect they would be performing a Governmental function and are therefore not amenable to suit. Clearly this is not so—the following cases establish the liability of the District of Columbia for accidents which occur between the curb line bounding the street and to the building line. *Gittleston et al v. Robinson, et al*, 67 *Washington Law Reporter* 1237 (1948).

“The rule in the District of Columbia is that the sidewalks of the District of Columbia extend from the curb bounding the street to the building line, and that it is the duty not only of the District of Columbia but

of the owner of the property to whose convenience and use trap doors are placed in the sidewalk to keep them in a safe condition.”

This case refers to *Way v. Efdimis*, 66 App. D. C. 92, 85 F 2nd 258 (1936) which case stated the rule above and further held that the District of Columbia had a duty to keep “a trap door in safe condition for a woman who stepped on it to read a ‘for rent’ sign displayed on the building”, see also the case *Dotey v. District of Columbia*, 25 App. D. C. 232 to the same effect.

The complaint of the plaintiff below adopted by the third party plaintiff below, and the facts therein contained must be assumed as true for the purposes of this appeal, it would then appear that the District of Columbia created or maintained or permitted to be maintained a nuisance and it is therefore liable for damages to any person who received injury therefrom irrespective of negligence and notwithstanding that the municipality is exercising governmental powers or functions. 63 *Corpus Juris Secundum* (Section 770b page 66). See also Section 785 at page 95 of *Corpus Juris Secundum*, Volume 63 which cites very clearly the generally accepted doctrine that

“The Municipality may not surrender any jurisdiction or authority which would conflict with its duty to keep the streets in reasonably safe condition”, and the cases therein cited.

CONCLUSION

There has been error committed by the lower Court in granting the motion to dismiss. This accident happened on the District of Columbia property and the duty was upon the District of Columbia to maintain this portion of its property and its failure to do so makes it liable for the injury sustained. The mere failure of the plaintiff to file proper notice as required by law does not bar a defendant to the original action from interpleading the Dis-

trict of Columbia as a third party defendant upon whom should fall in whole or in part the burden of the judgment which might be rendered in this case.

RICHARD W. GALIHER

JULIAN H. REIS

WILLIAM E. STEWART, JR.

WILLIAM H. CLARKE

637 Woodward Building

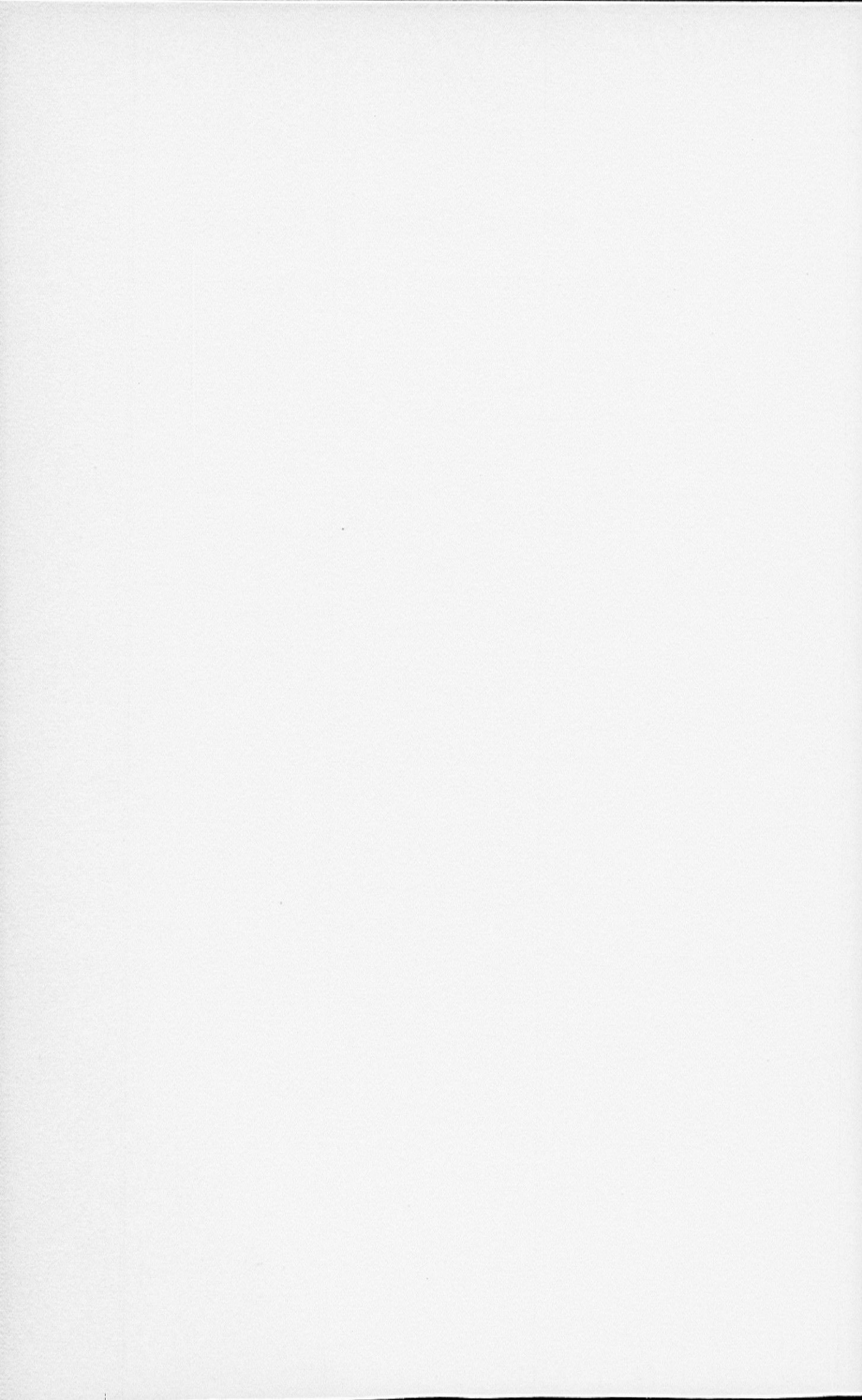
Washington, D. C.

Attorneys for Appellant

APPENDIX

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,557

EDWARD GEORGE DAVID, *Appellant*,

VS.

DISTRICT OF COLUMBIA, *Appellee*.

**Appeal from the United States District Court
for the District of Columbia**

JOINT APPENDIX

1 Filed Jun 29 1949 Harry M. Hull, Clerk

IN THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF
COLUMBIA

Charles W. Short,
Fairfax Hotel,
2100 Massachusetts Avenue, N. W.
Washington, D. C.

Plaintiff

v.

Edward George David,
1343 F Street, N. E.
Washington, D. C.

Defendant

and

George Courembis,
1901 15th Street,
North Arlington, Virginia,

Defendant

and

Louis J. Courembis,
5017 16th Street, N. W.
Washington, D. C.

Defendant

Civil Action No. 2809-'49
JURY ACTION.

Complaint for Negligence

The plaintiff Charles W. Short for cause of action alleges:

Count 1

1. The jurisdiction of this Court is invoked under Title 11, Sections 301 et seq. D. C. Code (1940). The matter in controversy exceeds, exclusive of costs, the sum of Three Thousand Dollars (\$3,000.00).

2. Plaintiff Charles W. Short resides at the Fairfax Hotel, 2100 Massachusetts Avenue, N. W., Washington, D. C. Defendant Edward George David resides at 1343 F Street, N. E., Washington, D. C. Defendant George Courembis resides at 1901 15th Street, North Arlington, in the State of Virginia. Defendant Louis J. Courembis resides at 5017 16th Street, N. W., Washington, D. C.

3. On January 1, 1948, defendants Louis J. Courembis and George Courembis were the owners in fee simple of Lot 63 in Square 183 improved by premises, 1123 17th Street, N. W., Washington, D. C., the basement of which is commonly known as "David's Grill", and said basement floor on said date was leased to Edward George David who was then and there tenant and custodian of said David's Grill, which was an eating establishment to which defendant Edward George David invited the
2 general public by means of diverse advertising.

4. On said date defendant Edward George David maintained in front of said premises 1123 17th Street, N. W., and in front of said David's Grill a projection beyond the building line on property of the District of Columbia, commonly known as a show window.

5. In front of said show window defendant Edward George David at said time negligently maintained an unguarded and open subsurface area which formed a well in front of said show window, and said open subsurface area was a continuation of the common walkway and part of the common approach to the eating establishment and especially to the show window, said approach being within the control of said defendant Edward George David on said date.

6. On or before January 1, 1948 defendant David affixed to said show window a certain advertisement commonly known as a bill of fare, and which was placed on said show window to induce and invite the general public to read it; and at or about 9:00 P. M. (it being dark at said time) on said January 1, 1948 plaintiff Charles W. Short

was induced by said advertisement to approach and read it, when because of the unlighted and unguarded open subsurface area of said show window then and there within the control of defendant David, plaintiff fell down violently and great injury to him resulted as hereinafter mentioned.

7. Said open subsurface area was negligently maintained by said defendant David, and was maintained in violation of Laws of Congress, and regulations promulgated thereunder, namely, Section 406-02 of the District of Columbia Building Code (1941), entitled:

“Area. Open subsurface spaces adjacent to buildings for lighting, ventilation, or entrance purposes to basements or cellars,” to wit:

“d. Other requirements—Areas must be protected by strong metal railings not less than 42 inches nor more than 48 inches high, etc.”;

and by reason of said violation and negligent maintenance of aforesaid dangerous open subsurface area, and by reason of the fact that defendant David invited plaintiff into said place of danger, plaintiff received great injuries hereinafter mentioned.

8. As a result of the aforesaid fall plaintiff suffered the following severe injuries: (1) Fracture of the left lateral malleolus (ankle), (2) Fracture of the fifth metatarsal foot (left), (3) Hemorrhage about the left ankle, (4) Injury to the left cuboid, (5) Swollen tissue and dilated veins of left leg, ankle, and foot, (6) Contraction of the toes of left foot, (7) multiple bruises about the body, (8) Acute sciatica in right leg, and (9) Other grievous and painful injuries.

By reason of said fall, plaintiff has sustained permanent injuries that render him a permanent cripple, and which have produced, produce, and will produce severe and continuing pain; he has been deprived of his opportunity to follow his occupation since the injuries; and has incurred bills, medical and others in connection with his

medical treatment and charges related thereto of over \$1000.00.

WHEREFORE, THE PREMISES CONSIDERED, plaintiff demands judgment against said defendant Edward George David in the amount of \$25,000.00 and costs.

Count 2

1, 2, 3. Paragraphs 1, 2, and 3 of Count 1 are incorporated by reference.

4. On January 1, 1948 defendants Louis J. Courembis and George Courembis were joint owners in fee simple of Lot 63 in Square 183 improved by premises 1123 17th Street, N. W., Washington D. C., part of which land and premises were leased, but aforesaid defendants as owners of said land and premises were in control of all the common approaches, exits, and passageways, as well as other parts of the said building, as owners thereof.

5. Defendants Louis J. Courembis and George Courembis maintained a show window on and before January 1, 1948 which was a projection of the basement floor of their said building and which rested on property of the District of Columbia. Directly in front of said show window said defendants maintained as owners of said building a permanent open subsurface area which was negligently left unlighted and unguarded in a contiguous position to the common walkway and approaches to said show window and to said building, said approaches being then in the custody of defendants Louis J. and George Courembis.

6. At or about 9:00 P. M. (it being dark at that time) on January 1, 1948, plaintiff approached said show window to read an advertisement affixed thereto, when by reason of said negligently maintained unguarded and unlighted open subsurface area, plaintiff fell violently sustaining great injuries hereinafter mentioned.

7. Said open subsurface area was negligently
4 maintained by said defendants Louis J. and George

Courembis, and was maintained in violation of Laws of Congress and regulations promulgated thereunder, namely, Section 406.02 of the District of Columbia Building Code (1941) entitled:

"Area. Open subsurface spaces adjacent to buildings for lighting, ventilation, or entrance purposes to basements or cellars", to wit:

"d. Other requirements—Areas must be protected by strong metal railings not less than 42 inches nor more than 48 inches high etc.";

and by reason of said violation, and negligent maintenance of aforesaid dangerous open subsurface area, plaintiff received injuries aftermentioned.

8. Paragraph 8 of Count 1 is incorporated by reference.

WHEREFORE, THE PREMISES CONSIDERED, plaintiff demands judgment against said defendants in the amount of \$25,000.00 and costs.

Count 3

1, 2, 3. Paragraphs 1, 2, and 3 of Count 1 are incorporated by reference.

4. At or about 9:00 P. M. January 1, 1948, plaintiff was injured when he fell into an unguarded open subsurface area maintained by defendant Edward George David, or Louis J. Courembis and George Courembis, or all three, directly in front of a show window which projected out from said premises 1123 17th Street, N. W., Washington, D. C., said premises being owned in fee jointly by defendants George and Louis J. Courembis, and the basement of same being leased by defendant Edward George David as a common eating establishment.

5. Said subsurface area in front of said show window was maintained for the benefit of each and every defendant as it afforded entrance, light and air to the entire building including said eating establishment, and said area

was within the custody and control of either defendant David or defendants George and Louis J. Courembis, or all of them, and said area was negligently maintained in that it was unguarded and not sufficiently lighted at night, and was maintained by one or all of defendants in violation of Laws of Congress and regulations promulgated thereunder, namely Section 406-02 of the District of Columbia Building Code (1941) entitled:

5 “Area. Open subsurface spaces adjacent to buildings for lighting, ventilation, or entrance purposes to basements or cellars,” to-wit:

“d. Other requirements—

Areas must be protected by strong metal railings not less than 42 inches nor more than 48 inches high etc.”; and by reason of said violation and said negligent maintenance of the area, by each and every defendant, and by reason of the fact that plaintiff was invited into said place of danger by defendant David by means of an advertisement, to wit, a bill of fare, plaintiff sustained the injuries aftermentioned.

6. Paragraph 8 of Count 1 is incorporated by reference.

WHEREFORE, THE PREMISES CONSIDERED, plaintiff demands judgment against said defendants in the amount of \$25,000.00 and costs.

/s/ Charles V. Imlay
Charles V. Imlay
/s/ Carl H. Imlay
Carl H. Imlay

• • • •

6 Filed Jul 18 1949 Harry M. Hull, Clerk

Motion to Bring in Third Party Defendant

Defendant, David, moves for leave to make the District of Columbia, a Municipal corporation, a party to this action, and that there be served upon its summons and

third party complaint as set forth in Exhibit "A" hereto attached.

/s/ R. W. Galiher
Richard W. Galiher
/s/ J. H. Reis
Julian H. Reis
Attorneys for Defendant,
David
Woodward Building

* * * *

7 Filed Jul 18 1949 Harry M. Hull, Clerk

Order

Upon consideration of the motion to bring in third party defendant, it is by the Court this 18th day of July, 1949,

ORDERED, that the same be and is hereby granted, and that the District of Columbia, a Municipal Corporation, is hereby made a third party defendant, and the Clerk of the Court be, and is hereby,

ORDERED, to issue summons and third party complaint.

/s/ H. N. Schweinhaut
Judge

* * * *

8 Filed Jul 20 1949 Harry M. Hull, Clerk

Third Party Complaint

1. Plaintiff, Charles W. Short, has filed suit against the defendant, Edward George David, and others, a complaint, a copy of which is hereto attached as EXHIBIT "B".

2. The plaintiff alleges negligence of this defendant in maintaining an unguarded area in front of a show window of premises on the first floor of a building, located at

1123 - 17th Street, N. W., owned by the other defendants, a portion of which, within the premises, was rented to this defendant and third party plaintiff, and said complaint also alleges negligence on the part of this defendant

9 in failing to provide metal rails guarding a subsurface area, and in failing to provide proper lighting, all of which caused the plaintiff to fall in said open subsurface area, and to be injured. That the place where plaintiff fell was on the public property of the third party defendant, District of Columbia, a municipal corporation, which third party defendant was obligated to control and maintain in safe condition, together with the owners of the building at 1123 - 17th Street, N. W., the defendants, Courmbis, and that if this defendant and third party plaintiff, David, is responsible to the plaintiff for his injury, the third party defendant is responsible in whole, or in part, to the third party plaintiff, for all sums that the plaintiff may recover against him. That the third party plaintiff has duly notified the Commissioners of the accident and suit of the plaintiff within 6 months of the date it was sued.

WHEREFORE, the defendant and third party plaintiff demands judgment against the third party defendant, District of Columbia, a municipal corporation, for all sums that may be adjudged against David in favor of the plaintiff, Short.

/s/ R. W. Galiher
 Richard W. Galiher
 /s/ J. H. Reis
 Julian H. Reis
 Attorneys for Defendant
 and Third-Party
 Plaintiff
 Woodward Building.

* * * *

10 Filed Jul 20 1949 Harry M. Hull, Clerk

Answer of the Defendant, David, to Complaint

First Defense

The complaint fails to state a claim upon which relief can be granted as to this defendant.

Second Defense

The above named defendant admits the allegations contained in paragraphs one and two of the complaint; he admits that he leased a portion of the basement floor at the time and place alleged, but denies that he leased all of the basement floor; he admits the other allegations contained in paragraph three of the complaint, first count. He denies each and every allegation contained in paragraph four of the complaint, first count; he denies each and every allegation contained in paragraph five of the complaint, first count; he is without information or belief to either admit or deny the allegations concerning plaintiff's fall, but he denies each and every allegation of negligence contained in the complaint; he is without information or belief sufficient to either admit or deny the allegations concerning the plaintiff's personal injuries
11 or financial losses, he admits the allegations contained in paragraph four of count two; all other allegations contained in count two of the complaint apply to the other defendants, and this defendant is not required to answer said allegations; he denies each and every allegation of paragraph four of counts three and paragraph five of count three; he denies each and every other allegation contained in the complaint.

Third Defense

Further answering the complaint this defendant states that the accident of which plaintiff complains was contributed to by his own negligence.

/s/ Richard W. Galiher
Richard W. Galiher

/s/ Julian H. Reis
Julian H. Reis

Attorneys for above-named
defendant,
Woodward Bldg.

Cross-Claim

The defendant, David, cross-claims against the defendants George Courembis and Louis J. Courembis, for as follows:

1. That this defendant and cross-claimant leased from the defendants, George Courembis and Louis J. Courembis, the premises located on the first floor of the building, located at 1123 - 17th Street, Washington, D. C., which building and appurtenances thereto were owned by the defendants, Courembis; that the defendant, David, had no control nor did he maintain any portion of the premises other than those leased by him within the premises on the first floor thereof; that the accident of which plaintiff complains occurred on the outside of the said premises and at a place, owned, controlled, operated, or maintained, or which should have been maintained by either the defendants, Courembis, or by the District of Columbia, a Municipal corporation; that if this defendant is held to be responsible to the plaintiff for his accident, the defendants, Courembis, and/or the District of Columbia, a Municipal corporation, are responsible to this defendant, in whole or in part.

WHEREFORE, this defendant and cross-claimant demands judgment against the defendants, Courembis, for all sums that may be adjudged against the defendant, David, in favor of the plaintiff, Short.

/s/ Richard W. Galiher

Richard W. Galiher

/s/ Julian H. Reis

Julian H. Reis

Attorneys for above-
named defendant.

Woodward Building.

* * * *

13 Filed Sep 23 1949 Harry M. Hull, Clerk

*Motion to Dismiss as to Third Party defendant
District of Columbia*

The third party defendant District of Columbia moves the Court to dismiss the above-entitled action against the third party defendant on the ground that the third party complaint fails to state a claim against the third party defendant upon which relief can be granted.

/s/ Vernon E. West

Vernon E. West

Corporation Counsel, D. C.

/s/ Oliver Gasch

Oliver Gasch

Assistant Corporation
Counsel, D. C.

/s/ Milton D. Korman

Milton D. Korman

Assistant Corporation
Counsel, D. C.

* * * *

14 Filed Jan 4 1950 Harry M. Hull, Clerk

Order

Upon consideration of the motion of the third party defendant to dismiss the third party complaint, of the points and authorities in support thereof and in opposition thereto, of the arguments of counsel, and of the supplemental memoranda filed by counsel for the respective parties, it is, by the Court, this 4th day of January, 1950,

ORDERED, that the motion of the third party defendant be, and it is hereby, granted, and the third party complaint be, and it is hereby, finally dismissed.

/s/ R. B. Keech
Judge.

* * * *

15 Filed Feb 8 1950 Harry M. Hull, Clerk

Notice of Appeal

Notice is hereby given this day of *February*, 1950, that *EDWARD GEORGE DAVID* hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 4th day of *January*, 1950 in favor of *DISTRICT OF COLUMBIA*, against said *EDWARD GEORGE DAVID*.

/s/ R. W. Galiher
Richard W. Galiher

/s/ J. H. Reis
Attorney for Defendant
David
Julian H. Reis
Woodward Building.

BRIEF FOR APPELLEE

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals

For the

District of Columbia Circuit

No. 10557

FILED MAY 19 1950

EDWARD GEORGE DAVID, *Appellant*,

Joseph W. Stewart

CLERK

v.

DISTRICT OF COLUMBIA, *Appellee*.

VERNON E. WEST,
Corporation Counsel, D. C.,
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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10557

EDWARD GEORGE DAVID, *Appellant*,

v.

DISTRICT OF COLUMBIA, *Appellee*.

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Appellant's statement of the case is correct, except that it omits the following material facts:

In his complaint the plaintiff, Short, alleged that appellant, David, was the custodian of the basement, in which he conducted an eating establishment known as David's Grill. The complaint further alleged that either or all of the defendants maintained in front of said premises, and in front of David's Grill, a show window which projected beyond the building line on District of Columbia property; that either or all of the defendants negligently maintained in front of said show window, and on District property, an open, unguarded and unlighted area; that the

Building Regulations define "area" as "Open subsurface spaces adjacent to buildings for lighting, ventilation, or entrance purposes to basements or cellars" and require that such areas be protected by metal railings 42 to 48 inches high; that in violation of the Building Regulations the area in question was not so protected; that an advertisement was affixed to the show window, and that, at about 9 p. m., it being dark at the time, Short approached the show window to read the advertisement and fell into the open area.

Plaintiff, Short, did not bring suit against the District of Columbia.

The District of Columbia moved to dismiss the third-party complaint upon the ground that it failed to state a claim upon which relief could be granted. In the memorandum of points and authorities filed in support of that motion, authorities were cited in support of the propositions that compliance with the "Notice Statute" (Act of February 28, 1933, § 12-208, D. C. Code, 1940), is prerequisite to the maintenance of the action, and that the enforcement of Building Regulations is a governmental function and failure to enforce such regulations does not render the District of Columbia answerable in damages. Thereafter the District filed a supplemental memorandum of points and authorities, citing authorities for the proposition that the District, when it is compelled to pay damages to a member of the public injured by reason of some condition created in public space for the benefit of abutting property, is entitled to complete indemnity from the one responsible for the creation or maintenance of that condition, and that the existence of that right of indemnity necessarily defeats David's claim for contribution from the District.

At the argument on the motion, counsel for the District conceded that the third-party plaintiff in this case was not required to give notice to the Commissioners in compliance with the notice statute. The motion to dismiss was granted, and from the order granting that motion this appeal was taken.

STATUTES INVOLVED

Act of June 19, 1934, c. 651, § 1, (48 Stat. 1064), U. S. C. Title 28, § 723b:

“That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.” (Emphasis supplied.)

SUMMARY OF ARGUMENT

The District of Columbia concedes that the “Notice Statute” (Act of February 28, 1933, § 12-208, D. C. Code, 1940) has no application to this appeal. Failure to comply with that statute was not the basis of the ruling below which is appealed from.

The area involved is an easement in public space which exists solely for the benefit of appellant and his landlord.

It is the duty of the person in control of the property to which such an easement in public space is appurtenant to protect the public from injury therefrom.

If, in this case, the plaintiff had sued and recovered from the District, the District would have an action over against the person in charge of the easement for indemnity. The right of the District to bring an action over against appellant for indemnity necessarily negatives any right in the appellant in the same case to maintain an action for contribution against the District. The two propositions are mutually exclusive.

The Federal Rules of Civil Procedure do not “abridge, enlarge, nor modify the substantive rights of any litigant.”

ARGUMENT

At the outset, the District of Columbia concedes in this Court, as it did in the District Court, that in this case the third-party plaintiff, who was originally sued eighteen months after the happening of the accident, was not required to give notice to the Commissioners “* * * within six months after the injury or damage was sustained * * *”, as provided by the “Notice Statute” approved February 28, 1933; § 12-208 D. C. Code, 1940. This concession does not, of course, extend to the original plaintiff who, by the terms of Rule 14, F. R. C. P., is permitted to “* * * assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff’s claim against the third-party plaintiff.”

Notwithstanding this concession, the judgment of the District Court dismissing the third-party complaint was correct and should be affirmed.

Neither the complaint nor the third-party complaint alleges that the area was created by the District, and it must, therefore, be assumed that the District did not create it. But the record does show that the area was constructed on public space solely to provide light, air and access to the basement occupied by appellant.

In *Security Savings and Commercial Bank v. Sullivan*, 49 App. D. C. 118, 120, 261 Fed. 460, 462, this Court adopted for such situations the “safe” rule that

“* * * where a property owner, for the benefit of his property, secures an easement from the city to construct a vault or extension of the basement under the sidewalk, with permission to place in the sidewalk basement doors, a coal hole, or, as in this instance, a contrivance for lighting the vault and basement, so long as he retains any control whatever over the premises, he should be required to see that the condition thus created is kept safe and in good repair.

"This is not a suit between landlord and tenant, nor one arising from the negligence of the tenant within the portion of the premises occupied by it, but a suit involving a member of the public, who was injured upon a public sidewalk. In determining liability, it is proper to consider the obligation which the owner of the property assumed toward the public in extending his building under the sidewalk, and creating a condition in the walk which, if allowed to become defective, would jeopardize the safety of the public.

"The vault in question is an easement that belongs to the land, and the obligation of the owner to keep it in safe condition and repair—

'goes with the land, and cannot be discharged by a partial alienation of the land, at least, unless the alienation, if for a fixed term, carries with it the exclusive possession of the premises for that term. Entire possession by a tenant from foundation to roof doubtless involves the duty of keeping a grate in front of the premises in repair, which otherwise rests on the owner of the fee. But whoever, even by due permission, cuts a hole in the sidewalk for the benefit of his adjoining property, must use reasonable care to protect the public from danger on account thereof. Reasonable care requires that he should provide a proper covering, inspect it from time to time, and repair it when necessary, as otherwise passers-by, for whose benefit the sidewalk is maintained, may be injured. *Trustees of Canandaigua v. Foster*, 156 N. Y. 354, 361, 50 N. E. 971, 972 (41 L. R. A. 554, 66 Am. St. Rep. 575).

• • • • •

"* * * The rule undoubtedly applies where the entire property is demised, and the tenant, being required to keep the premises in repair, allows a portion thereof to become defective, resulting in injury to a third party. It would also apply where

a tenant leases a portion of a building and the accident occurs through the negligence of the tenant in keeping the portion exclusively demised to him in repair (pp. 121; 463).''

Short, by complying with the "Notice Statute", undoubtedly could have brought suit against the District of Columbia, since the area into which he fell is on District property. Had he done so, he might have obtained a judgment against the District of Columbia. However, if Short had sued the city, the District, by giving notice of the pendency of the action to the owners and the tenant, could have preserved its right to bring an action over against them for indemnity to recover from either or all of them the amount the District might pay in satisfaction of any judgment obtained by Short against the District.

In *Washington Gaslight Co. v. District of Columbia*, 161 U. S. 316, 326, 40 L. Ed. 712, 718, the Supreme Court asked and held:

"Second. Had the District a cause of action against the Gas Company resulting from the fact that it had been condemned to pay damages occasioned by the defective gas box, which it was the duty of the Gas Company to supervise and repair?"

"An affirmative answer to this proposition is rendered necessary by both principle and authority. This court said in *Chicago v. Robbins*, 67 U. S. 2 Black, 418, 422 [17:298, 302]: 'It is well settled that a municipal corporation having the exclusive care and control of the streets is obliged to see that they are kept safe for the passage of persons and property, and to abate all nuisances that might prove dangerous; and if this plain duty is neglected, and any one is injured, it is liable for the damages sustained. The corporation has, however, a remedy over against the party that is in fault, and has so used the streets as to produce the injury, unless it was also a wrongdoer.' And the same doctrine is reiterated in almost the identical language in *Rob-*

bins v. Chicago, 71 U. S. 4 Wall. 657, 670 [18:427, 429].”

The case of *Way v. Efdimis*, 66 App. D. C. 92, 85 F. 2d 258, relied upon by appellant, provides a perfect example of the manner in which the right to indemnification of the District operates. In that case plaintiff Efdimis stepped upon trap doors on public space in front of a window of premises No. 1629 North Capitol Street. The doors collapsed and plaintiff sustained injuries. She brought an action against the owner of record, Way, and the District of Columbia. The District thereupon gave notice to Way that it claimed full exoneration from her, and gave her an opportunity to defend the District in said suit. Way took no action to defend the District. During the trial of that case cross-examination of a witness produced by the defendant Way revealed that Way was in fact a straw party who held title to the property, the equitable interest in which was owned by Messrs. Boss and Phelps, and that the firm of Boss and Phelps had from time to time repaired the trapdoors. Plaintiff recovered judgment against the District and Way. After affirmance by this Court, that judgment was satisfied by the District. Thereafter the District brought an action over against Boss, Phelps and Way, Civil Action No. 892, filed December 5, 1938. In that action over the District obtained judgment against the defendants for the full amount paid by it in satisfaction of the judgment obtained by Efdimis, together with interest and costs.

It is difficult to follow the argument of appellant in his brief that he is entitled to contribution from the District on the facts of this case, particularly when he cites as authority for his contention the case of *Georges Radio v. Capital Transit Company*, 75 U. S. App. D. C. 187, 126 F. 2d 219. In that case this Court expressly overruled its

earlier decision in *Curtis v. Welker*¹ in which, on the authority of *Union Stockyards Co. v. Chicago, etc., R. R. Co.*,² it had denied contribution between joint tort-feasors. Explaining its conclusion, this Court pointed out (pp. 190; 222) that

“The Stock Yards case was not a suit for contribution. In that substantial respect it differed from the case under consideration. It was instead a case for indemnity in which one of the parties, having discharged the whole liability, sought to recover the whole outlay from the other. * * *

* * * * *

“* * * there is a manifest distinction, though at times lost sight of, between suits in contribution and suits in indemnity. For, as is often said, the latter implies a primary or basic liability in one person, though a second is also liable with the first to a third. In such a case the discharge of the obligation by the second person leaves him with a right to secure compensation from the one who, as between themselves, is primarily liable. As between such persons, the obligation ‘is not consensual’, but is based altogether upon the law’s notion—influenced by an equitable background—of what is fair and proper between the parties. *The most familiar types under this rule are cases in which a municipal corporation is held liable to a person injured by defects in a highway and is allowed to secure reimbursement from the parties who created the defect; or in which the occupant of premises is held liable for injuries from dangerous conditions thereon and is allowed to recover from the one who, unknown to him, created the dangerous condition; or in which the owner of leased premises who is made*

¹ 54 App. D. C. 272, 296 F. 1019.

² 196 U. S. 217, 25 S. Ct. 226, 49 L. Ed. 453.

to pay the damages may recover from the leasee in possession. The difference between indemnity and contribution—in cases between persons liable for a wrong—is that in the former the law implies an agreement or obligation and enforces a duty on the primary or principal wrongdoer to respond for all the damages, whereas in the latter, there is no agreement, express or implied, but a common burden in which the parties stand in equali juri and which in equity and good conscience should be equally borne. * * *”. (Emphasis supplied).

Appellant is apparently under the impression that the Federal Rules of Civil Procedure provide him with a new substantive right, to proceed by way of third-party action against the municipality for “contribution” in a case in which he, as the tenant of premises to which an easement in the public street is appurtenant, is sued by one claiming to have been injured by reason of a defective condition created by the failure to properly maintain that easement. The Act of Congress authorizing the Supreme Court to prescribe the new rules of procedure specifically provides (ante p. 3) that those rules “* * * shall neither abridge, enlarge, nor modify the substantive rights of any litigant. * * *”. And in 1 Moore’s Federal Practice, at page 736, under the title “Analysis of Third-Party Practice,” the author states:

“Third-party practice, or impleader, is a procedural device whereby a party to an action may bring in an additional party and claim against such party, because of a claim that is being asserted in the action against the original party. * * *

“Impleader is a procedural device that is new to many American jurisdictions and to many practitioners. But its roots go deep in the common law. They strike the procedural device known as ‘vouching to warranty.’ * * * Vouching to warranty applied also to chattels. And the underlying theory

has been extended generally to cover all claims for indemnity, express or implied-in-law.⁴ * * *

⁴ Freeman on Judgments (5th ed.) §§ 444, 445, et seq.; *Chicago City v. Robbins* (1862) 2 Black 418, 17 L. Ed. 298 (tort; landowner concluded by a judgment recovered against municipality for defect in street caused by his negligence if he knew that the injured person's suit against the city was pending and could have defended it)."

The facts in the case of *Chicago v. Robbins*, 67 U. S. 418, 17 L. Ed. 298, which was approved and followed by the Supreme Court in the *Washington Gaslight* case, *supra*, and cited by Moore, are strikingly similar to those in the case at bar. There, one Woodbury fell into an area in the street excavated by Robbins, and recovered a judgment against the city which the city paid. The city sued to recover over from Robbins. The Supreme Court held (pp. 425; 303):

"The City must be reimbursed unless it has been itself in fault. The rule of law is, that one of two joint wrong-doers cannot have contribution from the other. It is difficult in this case to see how the City was to blame, and least of all how Robbins can impute blame to it. Robbins desired to erect a large storehouse, and to add to its convenience, wished to excavate the earth in the sidewalk in front of his lot. Without express permission from the City, but under an implied license, he makes the area. No license can be presumed from the City to leave the area open and unguarded even for a single night. The privilege extended to Robbins was for his benefit alone, and the City derived no advantage from it, except incidentally. Robbins impliedly agreed with the City, that if he was permitted to dig the area, for his own benefit, that he would do it in such a manner as to save the public from danger, and the City from harm. And he cannot now say that true it is you gave me permission to make the area, but you neglected your duty in not directing me how to make it, and in not protecting it when in a dangerous condition. If

this should be the law, there would be an end to all liability over to municipal corporations, and their rights would have to be determined by a different rule of decision from the rights of private persons. Because the City is liable primarily to a sufferer by the insecure state of the streets, offers no reason why the person who permits or continues a nuisance at or near his premises should not pay the city for his wrongful act. The City gave no permission to Robbins to create a nuisance. It gave him permission to do a lawful and necessary work for his own convenience and benefit, and if, in the progress of the work, its original character was lost, and it became unlawful, the City is not in fault. We can see no justice or propriety in the rule, that would hold the City under obligation to supervise the building of an area such as this.”³

In summary, the situation is that appellant, as one of the persons charged with the duty of maintaining the easement in public space in reasonably safe condition, could be held liable to the plaintiff for injury resulting from failure to perform that duty. Likewise, the District, being charged with the duty of exercising reasonable care to maintain the streets in reasonably safe condition could, if sued, be held liable to the plaintiff for the same injury. But the District's duty is owed to the public, and to appellant only as a member of the public, but not to the appellant in his capacity as possessor of an easement in its street; whereas the duty of appellant is owed to the public *and* to the District as an incident of his occupation of the street. Thus, since the District, if it were found liable to the original plaintiff, would have a full and unquestioned right to indemnity from the appellant under the cases cited above, it is obviously impossible, under those same cases, for the appellant to possess at the same time a right to contribution from the District. The two propositions are mutually exclusive.

³ This quotation taken from 67 U. S. 425. In 17 L. Ed. 303 the paragraph is quoted erroneously.

CONCLUSION

It is respectfully submitted that the judgment of the District Court was right and should be affirmed.

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